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No. 92-1655

In the

Supreme Court of the United States

OCTOBER TERM, 1992

DISTRICT OF COLUMBIA,
Petitioner,

v.

THOMAS HANSFORD, *et ux.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

REPLY TO BRIEF IN OPPOSITION

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The brief in opposition raises two procedural matters that were not addressed in the petition and that warrant short responses: that (1) the issue presented by the petition had not been raised in the trial or intermediate appellate courts and had not been addressed by the Maryland Court of Appeals (opp. at 6); and (2) Sup. Ct. Rule 29.4(c) requires the petition to have been served on the attorney general of Maryland. *Id.*, n. 3. We also respond to assertions minimizing the issue's constitutional significance.

1. THE ISSUE PRESENTED WAS RAISED BELOW. The contention that the District had not presented the issue raised by the petition in the state trial and intermediate courts, even if true, has no bearing on this Court's consideration of the issue if it was properly raised in the Maryland Court of Appeals.[1] Maryland practice permits appellees to present

[1] In fact, however, as the Maryland Court of Special Appeals noted, in that court the District had defended dismissal of the action on the ground that the alleged negligence occurred on "a federal enclave, over which the District and the United States have been ceded exclusive jurisdiction." A. 3b; footnote omitted.

arguments in support of judgment, whether or not raised below. *See*, A. 7b, citing *Robeson v. State*, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979), *cert. denied*, 444 U.S. 1021 (1980). This Court has a similar practice. *See*, *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

There is no doubt that both the District's answer to the Hansfords' petition for review and its brief in the Maryland Court of Appeals addressed the issue at length, relying on Article I, § 8, Cl. 17, and the 1923 congressional statute.[2] In turn, that Court discussed it in the final portions of its opinion (A. 19a-22a), characterizing it as a Supremacy Clause question even though the decisions which it distinguished were decisions involving Article I, § 8, Cl. 17. *See id.* at 19a-21a. When the record shows that the issue was presented below, it has been preserved for review by this Court. *See Street v. New York*, 394 U.S. 576, 581-585 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

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[2] Opening sentences of three sections of the District's brief encapsulate arguments made in succeeding pages. The first stated: "Under constitutional principles, state instrumentalities cannot use their powers in ways that could 'interfere with the essential and necessary functions of the federal government' on federally-owned land * * *." Br. at 15. The second stated: "Congress has authorized the District to acquire land in neighboring states and to title it in the name of the United States precisely in order [to] protect the District from assertions of state jurisdiction." *Id.* at 20. The third stated: "For the reasons outlined in the preceding sections of this Argument, it is inconsistent with the Constitution (and with unmistakable congressional intent) to make the District answerable in the courts of another state for its governmental activities on federal land." *Id.* at 26. The brief's table of contents reveals how much attention the brief devoted to the issue:

I. The District of Columbia Is Immune from Suit and Not Subject to the Jurisdiction of Maryland Courts for Its Activities on Federal Land Acquired for Its Use at the Direction of Congress with the Acquiescence of the State. 9

* * *

C. The constitutional basis for immunity 15

D. Interference with governmental activities at Oak Hill . . . . . 20-[25]

Having made the federal claim in the Maryland courts, the District is free to "make any argument in support of that claim" and is "not limited to the precise arguments [it] made below." *Yee v. City of Escondido*, 503 U.S. __, 112 S. Ct. 1522, 1532 (1992); *see Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899).

2. IF SERVICE ON THE ATTORNEY GENERAL OF MARYLAND WAS REQUIRED, FAILURE OF SERVICE IS CURABLE AND SHOULD NOT BE A BASIS FOR DENYING REVIEW. The petition does not challenge the constitutionality of Maryland laws. Rather, it asserts that Maryland laws conferring jurisdiction are preempted by Article I, § 8, Cl. 17, as implemented by the 1923 congressional statute,[3] to the extent that those laws would otherwise apply to the District. At most, the District challenges the decision below as an unconstitutional *application* of state jurisdictional statutes to the District. We do not regard either characterization of the issue presented as triggering Rule 29.4(c).

If failure to serve was error, however, it can be corrected. The Court has power to certify the question to the Maryland attorney general under 28 U.S.C. § 2403(b)[4] or to order the District to serve the petition. Noncompliance with Rule 29.4(c), if any, should not affect the Court's consideration of the petition on its merits. *Cf. United States v. Adams*, 383 U.S. 39, 42 (1966) (service rule is not jurisdictional and not a basis for denying a writ where "no prejudice resulted and the failure was inadvertent").

3. THE ISSUE IS CONSTITUTIONALLY SIGNIFICANT. Although the brief in opposition is correct that the issue presented by the petition involves a localized congressional exercise of power, that is true of all Clause 17 jurisprudence. But that scarcely makes Clause 17 inconsequential. As the Court has noted, " '[t]he object of the grant of exclusive legislation over the [D]istrict was * * * national in the

[3] Act of Feb. 28, 1923, 42 Stat. 1360, ch. 148, A. 2-3.

[4] The text of 28 U.S.C. § 2403(b) is reproduced *infra*, at 5.

highest sense * * *.' " *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933), quoting Judge (later Chief Justice) Taft in *Grether v. Wright*, 75 F. 742, 757 (6th Cir. 1896); brackets added.

At issue is whether Article I, § 8, Cl. 17, gives Congress power to place the District's governmental activities on a federal enclave (over which the state has ceded all jurisdiction) beyond control by state instrumentalities. That was surely Congress's intent in 1923 when it had Oak Hill titled in the name of the United States and made the District "agent[ ] of the United States." For the first time, a state court has held that Congress cannot achieve that goal. That holding merits further review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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STATUTE

28 U.S.C. § 2403(b):

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *